

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT AND APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals

For the

District of Columbia Circuit

No. 14,465

FILED AUG 15 1958

388

Joseph W. Stewart

THEODORE OTIS,

CLERK

Appellant,

v.

JAMES THOMAS, ET AL,

Appellee.

APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

ALLAN C. SWINGLE

Colorado Building
Washington 5, D. C.

Attorney for Appellant.

(i)

STATEMENT OF QUESTION PRESENTED

Did the District Court err in the holding that the appellant Otis must pay One Thousand Seven Hundred Fifty (\$1, 750. 00) Dollars, one-half of the verdict of Three Thousand Five Hundred (\$3, 500. 00) Dollars, (App. 7) instead of allowing full credit for the Two Thousand Two Hundred Fifty (\$2, 250. 00) Dollars already paid by way of settlement by the defendant Rowe ?

INDEX

	<u>Page</u>
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE CASE	2
STATEMENT OF POINT	3
SUMMARY OF ARGUMENT	3
ARGUMENT	4
CONCLUSION	9

TABLE OF CASES CITED

American Jurisprudence - Contribution, Sections 3 & 4	5
Atlantic Coastline R. R. v. Ouzts, 82 Ga. App. 36, 60 S. E. 2d 770	5, 6
Bolick v. Gallagher, 268 Wis., 421, 67 N.W. 2d, 860	6
Clark v. Barlow, 74 App. D.C. 328, 122 F. 2d 337	8
George's Radio v. Capital Transit Co., 75 U.S. App. D.C. 187, 126 F. 2d 219	5
Insuranshares Corp. of Del. v. Northern Fiscal Corp., 42 F. Supp. 126	5
Karcher v. Burbank, 303 Mass. 303, 21 N.E. 2d 542	5
McKenna v. Austin, 77 App. D.C. 228, 134 F. 2d 659	5, 8
McMahon v. Matthews, 48 App. D.C. 303	8
Magruder v. National Metropolitan Bank, 40 A 2d 828 (Mun. Ct. of Appeals, D.C.)	8
Puck v. City of Chicago, 281 Ill. App. 6	6
Rosenthal v. Kolb, 97 A. 2d 925 (Mun. Ct. of Appeals, D.C.)	8
Schumacher v. Rosenthal, 226 F. 2d 946 (7th Circuit)	5
Uline v. Uline, 92 U.S. App. D.C. 281, 205 F. 2d 870	8

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 14,465

THEODORE OTIS,

Appellant,

v.

JAMES THOMAS, ET AL,

Appellee.

APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a final order of the United States District Court for the District of Columbia. The jurisdiction of this Court is invoked under Section 1291, Title 28, United States Code.

The judgment appealed from is a final judgment within the meaning of the aforesaid statutory provisions. An appeal was duly noted and perfected within the time provided by the applicable statutes and General Rules of this Court.

STATEMENT OF THE CASE

An automobile collision occurred at West Virginia Avenue and Oates Street, N. E., Washington, D. C., on September 11, 1954, between Theodore Otis and Charles Rowe.

The plaintiffs in this action were passengers in the taxicab owned by Dixie Cab Assn. and operated by Charles Rowe.

The plaintiffs, who received a jury verdict totaling Three Thousand Five Hundred (\$3, 500. 00) Dollars against the appellant, Otis, were James Thomas and Eunice Thomas Padgett. (App. 5) Hattie Thomas, originally a party, voluntarily dismissed her suit at trial. Prior to trial, the aforesaid three plaintiffs and Jeanette Thomas jointly signed a release, in favor of Rowe, in consideration of Two Thousand Two Hundred Fifty (\$2, 250. 00) Dollars total payment. (App. 9) The release did not specify how the total was to be divided among the four plaintiffs. The release expressly reserved for the signatories the right to pursue any claim against others, contemplating, presumably the defendant Otis.

The trial proceeded with Otis as the sole defendant. The verdict, as previously stated, was in favor of the plaintiffs, James Thomas and Eunice Thomas Padgett, in sums totaling Three Thousand Five Hundred (\$3, 500. 00) Dollars (App. 5).

The defendant Otis sought credit for the amount paid in settlement to the plaintiffs by defendant Rowe (App. 6) and the motion was granted to this extent: Both sides are to pay One Thousand Seven Hundred Fifty (\$1, 750. 00) Dollars of the Three Thousand Five Hundred (\$3, 500. 00) Dollars judgment and the plaintiffs are to remit Five Hundred (\$500. 00) Dollars to defendant Rowe who had settled, prior to trial, for Five Hundred (\$500. 00) Dollars more than One Thousand Seven Hundred Fifty (\$1, 750. 00) Dollars, one-half of the judgment. (App. 7)

This means, in effect, that appellant Otis is to pay to the plaintiffs One Thousand Two Hundred Fifty (\$1, 250. 00) Dollars and Five Hundred (\$500. 00) Dollars to the defendant who had entered a valid, final contract of settlement for Two Thousand Two Hundred Fifty (\$2, 250. 00) Dollars.

STATEMENT OF POINT

The District Court erred in granting a remittitur to the defendant Rowe in the amount of Five Hundred (\$500. 00) Dollars. Rowe had "bought his peace", paying Two Thousand Two Hundred Fifty (\$2, 250. 00) Dollars to the plaintiffs. (App. 9) The fact that the settlement was more than half the judgment of Three Thousand Five Hundred (\$3, 500. 00) Dollars should not penalize the appellant who bore the expense of litigation. Thus, in the instant case, the appellant should not be required to pay more than the One Thousand Two Hundred Fifty (\$1, 250. 00) Dollars difference between the settlement and the verdict returned by the jury. The settling defendant should not benefit from a settlement agreement which may have been imprudently made. To permit a remittitur would symmetrically allow a Court, in a case where the verdict is more than twice the settlement, to require a defendant who has settled to pay more than he bargained for and entirely vitiate the contract of release contrary to every principle favoring compromise. Such a procedure would discourage rather than encourage settlements.

SUMMARY OF ARGUMENT

It has been reiterated numerous times that the law favors settlements and to vitiate this principle by alteration of a contract of release would be directly contrary to one of the most firmly established principles of law.

Although the principle of equality of burden between or among joint tort feasers is well recognized, it is this defendant's contention that the law of Contract and the favored principle of settlement should

be given equal dignity in the consideration of the problem.

The law must be considered as a whole. It would be a relatively simple matter to categorize the law substantively and arrive at an answer to a given problem. However, where a problem touches on many areas of the law, established rules and principles in all areas must be considered in arriving at a fair and logical conclusion.

Although the principle of contribution is based on the theory of equality in bearing a common burden, it would be unfair to require a settling defendant to pay over a sum to the judgment defendant. Such a procedure would violate the finality of the settlement agreement.

Similarly, it would be unfair for a judgment defendant to pay over a sum to the settling defendant. The settler should not benefit from a settlement imprudently made.

Further, there are other unfair effects more readily apparent in instances where the amount of the settlement and the amount of the verdict vary sharply.

ARGUMENT

In the instant case, the Court ruled that the defendant Otis is to pay one-half of the Three Thousand Five Hundred (\$3,500.00) Dollars obtained by the two plaintiffs at trial. (App. 7) The Court, also, held that there is to be a remittitur to Rowe, the settling defendant, in the amount of Five Hundred (\$500.00) Dollars. (App. 7) In effect, therefore, the plaintiffs are to receive One Thousand Two Hundred Fifty (\$1,250.00) Dollars from the appellant Otis and Rowe is to receive Five Hundred (\$500.00) Dollars from the appellant.

In discussing this problem, we must consider the principles of contribution and credit and the well-recognized maxim that the law favors compromise and settlement. Also to be considered, are the ramifications of the adoption of the formula applied in the instant case and, specifically, the fairness to be obtained if the verdict in the instant

case had been much higher or extremely lower than the Three Thousand Five Hundred (\$3, 500.00) Dollars recovered.

The principle of contribution is based on the equity theory of equality in bearing a common burden. Re Toole 274 F 337; Am. Jur., Contribution, Sections 3 and 4. The general rule is that one who is compelled to pay or satisfy the whole or bear more than his just share of a common burden or obligation upon which several persons are equally liable, or which they are bound to discharge, is entitled to contribution against the other. George's Radio v. Capital Transit Company, 75 U. S. App. D. C. 187, 126 F.2d 219.

As stated, this is the general rule. However, in the instant case we have added an additional element. The element of a prior settlement; a lawful compromise and settlement between the plaintiff and one of the tort feasons before judgment was taken against the second tort feason. It is in this area that the law in the District of Columbia is still unsettled. True, the case of McKenna v. Austin, 77 App. D. C. 228-234, 134 F.2d 659, lays down a formula to be followed. However, this formula, although at first glance is apparently sound, does not go far enough. The dissenting opinion by Justice Stephens raises serious challenges.

This defendant argues that this Honorable Court first consider a few basic principles in the law of Contract and Contribution.

It is conceded that only one remedy exists for a single injury.

"The law will not permit a party to receive more than one compensation for an injury."

Karcher v. Burbank, 303 Mass.303, 21 N. E. 2nd 542. Therefore, where a settlement has been executed by one tort feason then that sum should be credited against the judgment so as to reduce the amount of damages recoverable from such other tort feason or tort feasons. Insuranshares Corp. of Del. v. Northern Fiscal Corp., 42 F. Supp. 126; Schumacher v. Rosenthal, 226 F.2d 946 (7th Circuit); Atlantic Coast Line

R. R. v. Ouzts, 82 Ga. App. 36, 60 S. E. 2d 770; Puck v. City of Chicago, 281 Ill. App. 6; Bolick v. Gallagher, 268 Wis. 421, 67 N. W. 2d 860.

It cannot be denied that compromise and settlement is favored by the Court. More correctly, compromise and settlement is encouraged by the Court as evidenced in our present day pre-trial procedure.

In the instant case, the plaintiffs received a jury award totaling Three Thousand Five Hundred (\$3, 500. 00) Dollars. (App. 5) The order of the Court requires that each defendant is to pay half the verdict, or One Thousand Seven Hundred Fifty (\$1, 750. 00) Dollars each. (App. 7) Since payment of more than One Thousand Seven Hundred Fifty (\$1, 750. 00) Dollars (\$2, 250. 00) has been made by the settling defendant, in compromise prior to trial, the plaintiffs are required to remit Five Hundred (\$500. 00) Dollars (the difference between one-half the verdict and the amount of settlement) to the defendant Rowe. The order of the Court does not specify, with clarity, how this is to be carried out. It appears uncertain whether execution of the order would require appellant Otis to pay the plaintiffs One Thousand Seven Hundred Fifty (\$1, 750. 00) Dollars, with the plaintiffs remitting Five Hundred (\$500. 00) Dollars to defendant Rowe, or whether appellant is to pay One Thousand Two Hundred Fifty (\$1, 250. 00) Dollars to the plaintiffs and Five Hundred (\$500. 00) Dollars to Rowe directly.

In either case, the effect is the same. The appellant who has borne the expense of litigation, must compensate the defendant Rowe who has settled a claim against him for more than half the verdict. Rowe benefits from the appellant's efforts despite the fact that he voluntarily agreed to the settlement; and notwithstanding the fact that he entered into a valid, final contract of settlement; and disregarding the fact that this agreement was made by defendant Rowe on his own and, of course, without the agreement, consent, or participation of the appellant.

One of the firmest blocks in the foundation of jurisprudence is the requirement that principles to fulfill the very definition must be readily adaptable to variations of circumstances and still capable of producing a just result.

The principle in this case is based on the formula suggested in the majority opinion of McKenna v. Austin, 78 App. D. C. 228, 234, 134 F.2d 659.

"So long as the judgment is for less than twice the amount of settlement there is no real difficulty. In that case, the wrongdoer who settles will pay more than half the total sum to the plaintiff. By settling with the injured person, he does not surrender his right of contribution and settlement should not give the other wrongdoer an advantage. Consequently, he should recover from the latter the amount necessary to equalize their payments."

The appellant avers that this is basically unfair. The quotation from McKenna v. Austin (*supra*) at 235, although discussing another principle, is tersely expressive of the appellant's reasoning.

"The principal objection to this solution lies in the facts that the defendant is not a party to the compromise, has no control over it and, therefore, should not be adversely affected by it."

McKenna v. Austin (*supra*) offers two solutions when the judgment exceeds twice the settlement. One would require the litigating defendant to pay the full amount of the judgment after deducting the sum paid in compromise. The other would fix the credit at half the judgment whenever the latter is more than twice the sum paid in settlement. Thus, in the instant case, if the judgment had been Five Thousand (\$5,000.00) Dollars, the plaintiffs would receive Two Thousand Five Hundred (\$2,500.00) Dollars from the appellant in addition to the Two Thousand Two Hundred Fifty (\$2,250.00) Dollars received in settlement for a total of Four Thousand Seven Hundred Fifty (\$4,750.00) Dollars, and, thus, would be penalized Two Hundred Fifty (\$250.00) Dollars for settling.

McKenna v. Austin (supra) does not mention a solution converse to its formula suggested when the judgment is less than twice the settlement.

To maintain symmetry, such a formula would require that the settling defendant pay an amount in addition to the settlement in order to equalize the payments to the plaintiffs. Thus, if the judgment in the instant case had been Five Thousand (\$5,000.00) Dollars, Otis, the litigating defendant would pay Two Thousand Five Hundred (\$2,500.00) Dollars, and Rowe, the settling defendant, would be required to pay Two Hundred Fifty (\$250.00) Dollars in addition to the Two Thousand Two Hundred Fifty (\$2,250.00) Dollars already paid in compromise.

Such a ruling reeks of inherent unfairness. Perhaps, its omission in McKenna v. Austin (supra) is a tacit condemnation of such a solution.

The law favors the amicable settlement of controversies and it is the duty of the Courts rather to encourage than to discourage parties in resorting to compromise as a mode of adjusting claims.

"The law looks with favor on all proper efforts in that direction."

McMahon v. Matthews, 48 App. D.C. 303. In accord, Clark v. Barlow, 74 App. D.C. 328, 122 F.2d 337; Uline v. Uline, 92 U.S., App. D.C. 281, 205 F.2d 870; Rosenthal v. Kolb, 97 A2d 925 (Municipal Ct. of Appeals, D.C.); Magruder v. National Metropolitan Bank, 40 A2d 828, (Municipal Ct. of Appeals, D.C.).

To allow recovery from one who had settled would most effectively disregard the basic principles of contract law. A release in settlement is a valid and binding contract.

It is no less unfair to allow the settler to benefit than for him to be penalized as he would be in the aforesaid circumstance. To maintain symmetry and fairness in our logic, it follows that the settling defendant is not entitled to be reimbursed in the sum of Five Hundred (\$500.00) Dollars.

The ruling in the instant case wreaks harshness which the equitable principle of contribution is invoked to mitigate.

There must be an examination of other circumstances to test the rectitude of the rule applied in the instant case. If the judgment had been Two Thousand Three Hundred (\$2,300.00) Dollars, the settling defendant would have received a reimbursement of One Thousand (\$1,000.00) Dollars despite his agreement to a valid contract to pay Two Thousand Two Hundred Fifty (\$2,250.00) Dollars.

If the jury verdict had been Two Hundred Fifty (\$250.00) Dollars, there is doubt as to whether there would be any contribution or whether the settling defendant would be entitled to be compensated for half the total amount paid in settlement. To require the latter, as the Court's ruling seems to indicate, would be grossly unjust since it is the litigating defendant's efforts which held the verdict to such a low figure. Further, it must be considered that sympathy verdicts in low amounts are rendered not infrequently despite careful court instructions.

It is no less unfair in principle, only in amount, to compel appellant Otis to pay more than One Thousand Two Hundred Fifty (\$1,250.00) Dollars, the difference between the settlement and the judgment. Under the present ruling, the defendant Otis who has incurred the expense in trial in which there is a verdict of less than twice the settlement, must share the cup of comparative victory with the settler who did not even participate in the event.

CONCLUSION

WHEREFORE, appellant respectfully submits that appellant's motion to allow credit in full should have been granted and respectfully moves this Court to enter an order directing that such be done.

Respectfully submitted,

ALLAN C. SWINGLE
308 Colorado Building
Washington 5, D. C.

Attorney for Appellant.

McKenna v. Austin (supra) does not mention a solution converse to its formula suggested when the judgment is less than twice the settlement.

To maintain symmetry, such a formula would require that the settling defendant pay an amount in addition to the settlement in order to equalize the payments to the plaintiffs. Thus, if the judgment in the instant case had been Five Thousand (\$5,000.00) Dollars, Otis, the litigating defendant would pay Two Thousand Five Hundred (\$2,500.00) Dollars, and Rowe, the settling defendant, would be required to pay Two Hundred Fifty (\$250.00) Dollars in addition to the Two Thousand Two Hundred Fifty (\$2,250.00) Dollars already paid in compromise.

Such a ruling reeks of inherent unfairness. Perhaps, its omission in McKenna v. Austin (supra) is a tacit condemnation of such a solution.

The law favors the amicable settlement of controversies and it is the duty of the Courts rather to encourage than to discourage parties in resorting to compromise as a mode of adjusting claims.

"The law looks with favor on all proper efforts in that direction."

McMahon v. Matthews, 48 App. D.C. 303. In accord, Clark v. Barlow, 74 App. D.C. 328, 122 F.2d 337; Uline v. Uline, 92 U.S., App. D.C. 281, 205 F.2d 870; Rosenthal v. Kolb, 97 A2d 925 (Municipal Ct. of Appeals, D.C.); Magruder v. National Metropolitan Bank, 40 A2d 828, (Municipal Ct. of Appeals, D.C.).

To allow recovery from one who had settled would most effectively disregard the basic principles of contract law. A release in settlement is a valid and binding contract.

It is no less unfair to allow the settler to benefit than for him to be penalized as he would be in the aforesaid circumstance. To maintain symmetry and fairness in our logic, it follows that the settling defendant is not entitled to be reimbursed in the sum of Five Hundred (\$500.00) Dollars.

The ruling in the instant case wreaks harshness which the equitable principle of contribution is invoked to mitigate.

There must be an examination of other circumstances to test the rectitude of the rule applied in the instant case. If the judgment had been Two Thousand Three Hundred (\$2,300.00) Dollars, the settling defendant would have received a reimbursement of One Thousand (\$1,000.00) Dollars despite his agreement to a valid contract to pay Two Thousand Two Hundred Fifty (\$2,250.00) Dollars.

If the jury verdict had been Two Hundred Fifty (\$250.00) Dollars, there is doubt as to whether there would be any contribution or whether the settling defendant would be entitled to be compensated for half the total amount paid in settlement. To require the latter, as the Court's ruling seems to indicate, would be grossly unjust since it is the litigating defendant's efforts which held the verdict to such a low figure. Further, it must be considered that sympathy verdicts in low amounts are rendered not infrequently despite careful court instructions.

It is no less unfair in principle, only in amount, to compel appellant Otis to pay more than One Thousand Two Hundred Fifty (\$1,250.00) Dollars, the difference between the settlement and the judgment. Under the present ruling, the defendant Otis who has incurred the expense in trial in which there is a verdict of less than twice the settlement, must share the cup of comparative victory with the settler who did not even participate in the event.

CONCLUSION

WHEREFORE, appellant respectfully submits that appellant's motion to allow credit in full should have been granted and respectfully moves this Court to enter an order directing that such be done.

Respectfully submitted,

ALLAN C. SWINGLE
308 Colorado Building
Washington 5, D. C.

Attorney for Appellant.

INDEX

	<u>Record Page</u>	<u>Appendix Page</u>
Complaint for Negligence	1	1
Answer of the Defendant Theodore Otis	6	3
Verdict and Judgment (Eunice Thomas Padgett, Plaintiff and Theodore Otis, Defendant)	10	5
Verdict and Judgment (James Thomas, Plaintiff and Theodore Otis, Defendant)	11	5
Motion for Judgment Non Obstante Verdicto or for New Trial or to Dismiss	12	6
Memorandum in Support of Motion for Judgment Non Obstante Verdicto or for a New Trial or to Dismiss		6
Memorandum of Judge McGuire, Filed November 27, 1957	13	7
Memorandum of Judge McGuire, Filed January 7, 1958	15	8
Notice of Appeal of Theodore Otis	18	8
Notice of Cross Appeal of James Thomas, Hattie Thomas and Eunice Thomas Padgett	19	9
Exhibit "A" - General Release	22	9

APPELLANT'S APPENDIX

1 [Filed December 23, 1954]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES THOMAS,
HATTIE THOMAS, and
EUNICE THOMAS PADGETT
1521 Webster Street, N. W.
Washington, D. C.

Plaintiffs

Civil Action No. 5413-54

v.

THEODORE OTIS
65 Allison Street, N. E.
Washington, D. C.

and

CHARLES H. ROWE
55 M Street, N. W.
Washington, D. C.

Defendants

COMPLAINT FOR NEGLIGENCE

(Automobile - Personal Injuries)

1. The amounts sued for herein are in excess of \$3,000.00 each and jurisdiction of this action is granted to this Court by Title 11, Section 11 - 305, D.C. Code, 1951.

2. Plaintiffs are adult citizens of the United States and residents of the District of Columbia. Plaintiff Hattie Thomas is the wife of plaintiff James Thomas. Defendant Theodore Otis is a minor citizen of the United States and a resident of the District of Columbia. Defendant Charles H. Rowe is an adult citizen of the United States and a resident of the District of Columbia.

3. On September 11, 1954, defendant Theodore Otis was operating an automobile on and over the public streets and highways of the District of Columbia. Defendant Charles H. Rowe was also operating an automobile owned by him, being a public taxicab bearing the identification

Dixie Cab #115, on and over the streets and highways of the District of Columbia. Plaintiffs James Thomas and Eunice Thomas Padgett were riding as paying passengers in the said taxicab owned and operated by
2 defendant Charles H. Rowe.

4. At this time defendant Theodore Otis negligently operated the automobile which he was driving at the intersection of Oates Street and West Virginia Avenue, N. E. in the District of Columbia, and defendant Charles E. Rowe negligently operated the automobile (taxicab) which he was driving, and in which plaintiffs James Thomas and Eunice Thomas Padgett were passengers, at the same intersection. Said negligence of defendant Otis and of defendant Rowe resulted in a collision at the aforesaid intersection.

CLAIM OF JAMES THOMAS

5. As a result of said collision plaintiff James Thomas was thrown into the dashboard and windshield of defendant Rowe's automobile and caused to sustain injuries to his head and skull, his right upper arm and elbow, and his left kneecap, his back and lower spine and was otherwise injured, which said injuries are permanent, was caused to sustain a traumatic shock, with resulting temporary psychotic state requiring constant attendance, loss of sleep, loss of weight and a nervousness which may well be permanent, was prevented from attending his place of work for more than three full weeks, from working on a full time basis nine more weeks and is still prevented from conducting his accustomed duties and responsibilities, suffered great pain of body and mind, and incurred heavy expenses for medical attention.

CLAIM OF EUNICE T. PADGETT

6. As a result of the aforesaid collision plaintiff Eunice Thomas Padgett was thrown into the back of the driver's seat of defendant Rowe's automobile, also striking her head on the side window of the car and her right hand on the doorknob, and was caused to sustain injuries to her head, face and neck, to the left side of her chest which was badly bruised, to her right wrist which was severely sprained, to both knees, to her
3 pelvic region where severe uterine bleeding occurred and

persisted, to suffer headaches, which headaches persist, and was otherwise injured, which said injuries are permanent, was prevented from attending her place of work for five days, suffered great pain of body and mind, and incurred heavy expenses for medical attention.

CLAIM OF HATTIE THOMAS

7. As a result of the aforesaid collision plaintiff Hattie Thomas, has suffered the loss of the companionship, services and consortium of her husband, the plaintiff James Thomas, by reason of the injuries sustained by said husband, as aforesaid; and was otherwise injured and damaged.

WHEREFORE, plaintiffs demand judgment against both the defendants, or either of them

(1) In favor of the plaintiff James Thomas, in the sum of Fifty Thousand Dollars (\$50,000.00), besides costs.

(2) In favor of the plaintiff Eunice Thomas Padgett, in the sum of Twelve Thousand Dollars (\$12,000.00) besides costs.

(3) In favor of the plaintiff Hattie Thomas, in the sum of Five Thousand Dollars (\$5,000.00), besides costs.

/s/ David A. Scott
Attorney for Plaintiffs
1025 Conn. Ave. N. W.
Washington 6, D. C.

DEMAND FOR JURY TRIAL

The plaintiffs demand a trial by jury on all the issues herein.

/s/ David A. Scott
Attorney for Plaintiffs

6

[Filed May 7, 1955]

ANSWER OF THE DEFENDANT THEODORE OTIS

FIRST DEFENSE

The complaint fails to state a claim against this defendant upon which relief may be granted.

SECOND DEFENSE

1. This defendant admits the allegations contained in paragraph 1 of the complaint.

2. This defendant admits that he is a minor citizen of the United States but this defendant is without knowledge or information sufficient to form a belief concerning the remaining allegations of paragraph 2.

3. This defendant admits that at the time stated in paragraph 3 he was operating an automobile on the public streets in the District of Columbia and that the co-defendant Charles H. Rowe was also operating a taxicab in the District of Columbia, but this defendant has no knowledge or information sufficient to form a belief concerning the remaining allegations of said paragraph.

7 4. This defendant denies all allegations of negligence alleged against him and admits that the co-defendant negligently operated his taxicab and further admits that there was a collision between the taxicab and the automobile operated by this defendant.

5, 6 and 7. This defendant has no knowledge or information sufficient to form a belief concerning the injuries, losses and damages alleged in paragraphs 5, 6 and 7 of the complaint and the remaining allegations of the complaint are denied.

THIRD DEFENSE

Such injuries, losses and damages as the plaintiffs may have sustained were the result of their own negligence or contributory negligence or were the result of an unavoidable accident.

FOURTH DEFENSE

Such injuries, losses and damages as the plaintiffs may have sustained were the result of the negligence or contributory negligence of the co-defendant Charles H. Rowe and his negligent violation of the Traffic and Motor Vehicle Regulations for the District of Columbia then and there in full force and effect.

SWINGLE AND SWINGLE

By

/s/ Allan C. Swingle
Attorneys for Defendant
308 Colorado Bldg.
Washington 5, D. C.

[Certificate of Mailing]

10

[Filed November 1, 1957]

VERDICT AND JUDGMENT

This cause having come on for hearing on the 31st day of October, 1957, before the Court and a jury of good and lawful persons of this district, to wit:

SADIE H. COWARD

JOHN M. SHEPHERD

MERLE A. HAWLEY

ARTHUR W. BALLOU

JOHN E. HANS

LILLIAN BANNISTER

ELIZABETH L. KAHN

HAZEL L. McADOO

CLARA B. M. SWALLEN

WALTER I. TAYLOR, JR.

ELISABETH L. VETTER

JEMIMA D. BLACKBURN

who, after having been duly sworn to well and truly try the issues between EUNICE THOMAS PADGETT, plaintiff and THEODORE OTIS, defendant, and after this cause is heard and given to the jury in charge, they upon their oath say this 1st day of November, 1957, that they find the issues aforesaid in favor of the plaintiff and that the money payable to her by the defendant by reason of the premises in the sum of ONE THOUSAND DOLLARS (\$1, 000).

WHEREFORE, it is adjudged that said plaintiff recover of the said defendant the sum of \$1, 000. 00 (One Thousand Dollars) without costs.

By direction of

Judge Matthew F. McGuire

HARRY M. HULL, Clerk

By

/s/ Ronald P. Maddox
Deputy Clerk

11

[Filed November 1, 1957]

VERDICT AND JUDGMENT

This cause having come on for hearing on the 31st day of October, 1957, before the Court and a jury of good and lawful persons of this district, to wit:

SADIE H. COWARD

JOHN M. SHEPHERD

MERLE A. HAWLEY

ARTHUR W. BALLOU

JOHN E. HANS

LILLIAN BANNISTER

ELIZABETH L. KAHN
CLARA B. M. SWALLEN
ELISABETH L. VETTER

HAZEL L. McADOO
WALTER I. TAYLOR, JR.
JEMIMA D. BLACKBURN

who, after having been duly sworn to well and truly try the issues between James Thomas, plaintiff and Theodore Otis, defendant, and after this cause is heard and given to the jury in charge, they upon their oath say this 1st day of November, 1957, that they find the issues aforesaid in favor of the plaintiff and that the money payable to him by the defendant by reason of the premises is the sum of TWO THOUSAND FIVE HUNDRED DOLLARS.

WHEREFORE, it is adjudged that said plaintiff recover of the said defendant the sum of \$2,500 (Two thousand five hundred dollars) without costs.

By direction of
Judge MATTHEW F. McGUIRE

HARRY M. HULL, Clerk
/s/ Ronald P. Maddox
Deputy Clerk

12 [Filed November 12, 1957]

MOTION FOR JUDGMENT NON OBSTANTE VERDICTO
OR FOR NEW TRIAL OR TO DISMISS

The defendant, Theodore Otis, moves the Court for judgment non obstante verdicto or for new trial for reasons hereinafter set forth in the attached memorandum.

[Granted in Part
Denied in Part
McGuire, J.
11/26/57]

SWINGLE AND SWINGLE
By /s/ Allan C. Swingle
Attorneys for Defendant,
Theodore Otis

[Certificate of Mailing]

[Filed November 12, 1957]

MEMORANDUM IN SUPPORT OF MOTION FOR JUDGMENT
NON OBSTANTE VERDICTO OR FOR A NEW TRIAL OR
TO DISMISS

It will be remembered that before proceeding to trial Allan C. Swingle, Attorney for Theodore Otis, moved the Court to permit his withdrawal from the case, which motion was denied. Thereafter, said counsel

moved that the trial not proceed on the grounds that the Court had not obtained general jurisdiction over the defendant, Theodore Otis, which motion was also denied.

Because counsel was required to proceed to defend Theodore Otis at the trial, he feels under the circumstances required under the Court's order to carry out to the fullest his representation of Theodore Otis, wherefor this motion.

It is believed that the motion for judgment non obstante verdicto should be granted for the reason that the Court erred in proceeding to a trial on the issues. Title 13, Section 105 of the District of Columbia Code provides that "whenever an infant is a party defendant in any suit. . . . it shall be the duty of the Court to appoint a suitable and competent person guardian ad litem for such infant, to appear for and defend such suit on his behalf" It appears from the face of the complaint that this defendant at the time service was obtained was an infant. The record will clearly show that no guardian ad litem was appointed for such infant. The case of *Gray v. Droze*, 55 A. 2d 340 says that there is "a mandatory duty on the trial courts to provide for every under-age defendant the protection of a guardian ad litem." That case further held that before a valid judgment can be entered against a minor, a guardian ad litem must be appointed for him and that opinion cites the following cases: *O'Hara v. McConnell*, 93 U.S. 150, 23 L. Ed. 840; *American Employees' Ins. Co. v. Lindquist*, 43 F. Supp. 610; *In re Morris' Estate*, 25 F. Supp. 454; *Williams et al v. Patterson*, 288 S. W. 132; *In re Jaeger's Will*, 218 Wis. 1, 259 N. W. 842, 99 A.L.R. 738; *Smith et al v. Smith, et al*, 255 Ky. 191, 72 S.W. 2d 425.

In the case of *Zaro v. Strauss*, 167 F. 2d 218, which arose in Florida, a default judgment was obtained against the defendant who, it was later discovered, had been adjudged incompetent in another state. Over a year later a bill of review was filed to set aside the judgment, which bill was granted. The record showed in that case that personal service was had on the defendant but there was then nothing to indicate that the defendant had previously been adjudged insane by a Probate Court

in another state. In the original answer to the complaint the incompetency of the defendant was set up as a defense. The Court in that case said, "The allegation of adjudged insanity put the Court upon inquiry as to the jurisdiction it had acquired through personal service upon the incompetent. That service was not an absolute nullity even conceding the fact set forth in the answer; it conferred upon the Court jurisdiction to inquire into the fact If, as the answer set up, defendant had been adjudged insane by a Court of competent jurisdiction, no further steps should have been taken without service upon her guardian if one had been appointed in Ohio and was present within the jurisdiction of the Court in Florida, or, if the guardian was not in Florida or if no Ohio guardian had been appointed, upon a guardian ad litem thereupon appointed by the Court in Florida. *** The Court in the original action acquired only limited jurisdiction of the defendant by the service of process upon her without service upon or appearance by her guardian if any and present in Florida, or if none or absent, a guardian ad litem."

It can be seen therefore that the Court in the instant case did not acquire a general jurisdiction over this defendant to the extent that it could proceed to a trial of the issues.

When this case was formerly called for trial before Judge Letts on May 10, 1957, that Court said it did not have general jurisdiction of this defendant because in order for the Court to get jurisdiction the statute had to be followed and you can't get it in any way except by following the statute. (Title 13, Sec. 105 D. C. Code). That Court further said to Plaintiff's attorney, "You were attempting to serve him as a minor, and you failed to meet the requirements of the statute in that regard by having the Court appoint a guardian ad litem, and defend for him." No further attempts were made thereafter by the plaintiff or cross-claimant to serve the defendant Otis although the case was continued at that time on condition that counsel for the plaintiff within a reasonable time bring the defendant Otis before the Court.

For the above reasons it is respectfully submitted that this Court has never acquired general jurisdiction over the defendant Otis and the trial, verdict and judgment should be considered a nullity and void.

If this Court does not agree to this defendant's contention as set out above, then certainly it should grant a new trial for the reason that the Court erred during the course of the trial in refusing to allow the defendant's counsel the right to cross examine the plaintiffs with respect to a paper purporting to be a release signed by the plaintiffs in August 1957 reciting the payment to them of the sum of \$2,250.00 by the co-defendant, Charles H. Rowe. This paper indicated said money was paid because of claims arising out of the automobile accident in question. Tied in with this proposition is the further proposition that in the event the Court does not agree that this was error then at least a credit should be allowed against the judgment in favor of this defendant in the amount of \$2,250.00 heretofore paid by Charles H. Rowe who was the driver of the taxicab in which the plaintiffs were riding at the time of this accident. In support of both of these propositions is the following: It is well settled that a party can have but one satisfaction for his damages and that proposition is supported by the greater weight of authority. *McWhirter v. Otis Elevator Company*, 40 F. Supp. 11; *Brandstein v. Ironbound Transp. Co.*, 112 N.J.L. 585, 172 A. 580, 104 A.L.R. 931; *Holland v. Public Utilities Co.*, 208 N. C. 289, 180 S.E. 592. The above and the following cases also support the proposition that "the amount paid by one tortfeasor to an injured person in consideration of a covenant not to sue, or a release not effective as a full release of the other tortfeasors, is to be regarded as a satisfaction pro tanto as to another or other tortfeasors liable for the same injury or wrong so as to reduce the amount of damages recoverable from such other tortfeasor or tortfeasors. *Insuranshares Corp. of Del. v. Northern Fiscal Corp.* 42 F. Supp. 126; *Schumacher v. Rosenthal*, 226 F. 2d 946; *Beck v. Bel Air Products*, 286 F. 2d 503; *Atlantic Coast Line R. Co. v. Ouzts*, 60 S. E. 2d 770, 82 Ga. App. 36; *Puck v. City of Chicago*, 281, Ill. App. 6; *Bolick v. Gallagher*, 67 N.W. 2d 860, 268 Wis. 421; *Pacific States Lumber Co. v. Bargar*, 10 F. 2d 335; *Karcher v. Burbank*, 21 N.E. 2d 542, 124 A.L.R. 1292.

For the above reasons the Court should grant a new trial after proper jurisdiction has been obtained over the defendant Otis or at least credit should be given defendant Otis on the judgment in the sum of \$2,250.

Respectfully submitted,

/s/ Allan C. Swingle
Attorneys for Defendant Otis
308 Colorado Building
Washington 5, D. C.

MEMORANDUM

The rule in this type of litigation appears to be that if the injured party has accepted satisfaction in full for the injury suffered by him, the law will not permit him to recover again for the same injury, but he is not affected until he has received full satisfaction or that which the law considers such. If he received part of the damages from one of the wrongdoers, receipt of such being understood to be not in full satisfaction of the injury, he does not thereby discharge, as a consequence, others from liability.

McKenna v. Austin, 77 U.S. App. D.C. 228 seems to hold this view and to go a step further: that no matter what the instrument might possibly be construed to be, namely, an absolute release or a covenant not to sue, the responsibility not being joint but several, a right of action against the non-settling defendant is permitted. The case seems to imply, and I use that term designedly, that credit should be allowed the sued tortfeasor for any amount paid in ostensible satisfaction by the non-sued tortfeasor. (p. 234) This appears to be the general rule as well, although it should be noted that the Court is careful to say (p. 234) that it is not deciding the matter of contribution or the question of credit since that was not in the given case precisely before it. See also, RESTATEMENT OF LAW, American Law Institute, TORTS, Vol. IV, Secs. 885, 886, p. 464 (d) Partial satisfaction.

- 14 The motion, therefore, for a new trial is denied. However, that aspect of the motion in which the defendant seeks credit for the amount paid in settlement is granted, and in respect and to this extent; Both sides are to pay \$1750, which means in the circumstances that there will be remittitur in favor of the settling defendant of \$500 - the total recovery to be \$3500.

There appears to be no settled formula. McKenna v. Austin, supra, as has been said in these circumstances does not purport to set forth any, except insofar as it may be said that the factual picture falls within the suggested pattern laid down on page 234, para. 11 and 12. This is the fair thing to do in the circumstances and it is particularly fair since the Court concludes that it could be argued with considerable cogency that the verdicts returned were on the excess side rather than a studied and objective evaluation, monetarily, of the injuries sustained.

With reference to the other contentions raised by the defendant, they are without merit.

Motion granted in part, denied in part. Order accordingly.

/s/ Matthew F. McGuire
United States District Judge

November 27, 1957

15 [Filed January 7, 1958]

MEMORANDUM

Motion for reconsideration and oral hearing denied.

The memorandum of November 27, 1957 speaks for itself. There is nothing that can be added from the Court's viewpoint. It might be said parenthetically that with reference to the release, Hattie Thomas had no claim because she dismissed it at the trial and it was for loss of consortium which, in the circumstances, was ridiculous. Jeanette Thomas also had no claim as she never brought suit, and presumably the release was of an omnibus character, specifically designed to take care of any contingency, which is natural in the circumstances. That being so, as far as the trial is concerned and the verdict of the jury, the only parties involved are James Thomas and Eunice Thomas Padgett.

Theoretically, Jeanette Thomas still has a right for suit. The statute has not run, but apparently she was not hurt and never made any claim and was only included in the release out of an abundance of caution by the carrier.

/s/ Matthew F. McGuire
United States District Judge

January 7, 1958

18 [Filed February 3, 1958]

NOTICE OF APPEAL

Notice is hereby given this Third day of February, 1958, that THEODORE OTIS, defendant in the above-entitled suit, hereby appeals to the United States Court of Appeals for the District of Columbia from

the judgment of this Court entered on the 3rd day of December, 1957 in favor of JAMES THOMAS, HATTIE THOMAS AND EUNICE THOMAS PADGETT against said THEODORE OTIS AND CHARLES H. ROWE.

Allan C. Swingle

By /s/ Edwin A. Swingle
Attorney for Defendant Otis

19 [Filed February 8, 1958]

NOTICE OF CROSS APPEAL

Notice is hereby given this 8th day of February, 1958, that JAMES THOMAS, HATTIE THOMAS and EUNICE THOMAS PADGETT, plaintiffs in the above-entitled action hereby cross appeal to the United States Court of Appeals for the District of Columbia from the Memoranda of this Court dated Nov. 27, 1957 and Jan. 7, 1958, and the judgment of this Court entered on the day of 195 in favor of JAMES THOMAS, HATTIE THOMAS and EUNICE THOMAS PADGETT against said THEODORE OTIS.

MOORE, SCOTT & HEINEMANN

By /s/ Lawrence C. Moore
Attorney for plaintiffs
216 Mills Bldg., Washington 6 DC

22 [Filed February 13, 1958]

EXHIBIT "A"

GENERAL RELEASE

KNOW ALL MEN, that (we) James Thomas and Hattie Thomas individually and as husband and wife and as parents of Jeanette Thomas, a minor and Eunice Thomas Padgett, all of 1521 Webster St., N. W., Washington, D. C. in consideration of TWO THOUSAND TWO HUNDRED FIFTY AND NO/100 (\$2,250.00) Dollars, lawful money of the United States of America, heretofore paid to me (us) by AMALGAMATED CASUALTY INSURANCE CO., of Washington, D. C., and Charles H.

Rowe and Dixie Cab Assn. ONLY do hereby remise, release and forever discharge the said AMALGAMATED CASUALTY INSURANCE CO. and Charles H. Rowe and Dixie Cab Assn. ONLY his (their) heirs, executors and administrators, of, and from all, and all manner of, action and actions, cause and causes of action, suits, damages, judgments, decrees, extents, executions, claims and demands, whatsoever, in law, equity, or otherwise, which against the said AMALGAMATED CASUALTY INSURANCE CO. and Charles H. Rowe and Dixie Cab Assn. ONLY (we) the said James Thomas and Hattie Thomas, individually and as husband and wife and as parents of Jeanette Thomas, a minor and Eunice Thomas Padgett ever had, now have, or which my (our) heirs, executors, or administrators hereafter can, or may, have, by reason of any matter, cause or thing whatsoever from the beginning of the world to the day of the date of this release, specifically including all claims against Charles H. Rowe and Dixie Cab Assn. ONLY arising out of an accident September 11, 1954. It is understood and agreed that this release shall not operate to bar any claims or rights of action asserted by the releasors against Theodore Otis.

IN WITNESS WHEREOF, (we) have hereunto set our hands and seals, this _____ day of August A. D. 1957.

CAUTION: This is a complete release of all claims. Read Before signing.

In the presence of --

/s/ James Yee

/s/ James Thomas (Seal)

/s/ Herbert R. Ralph

/s/ Eunice T. Padgett (Seal)

/s/ Miss Hubert Ralph

/s/ Mrs. James Thomas (Seal)

